

# European Minimum Standards for Courts: Independence, Specialization, Efficiency – A Glance from Italy

**Remo Caponi**

*Università di Firenze*

## I. OVERVIEW

The organisers of the Regensburg conference entrust me with the task of giving an overview of judicial independence, court specialization and efficiency in the Italian legal system, with a view to contributing to the debate on common European minimum standards for courts.<sup>1</sup>

According to this proposal, the following items will be covered. First of all, I will examine efficiency, namely: (a) drafting a principle of efficiency of civil procedure, fit to capture the structure and purpose of judicial systems, with a view to proposing a draft principle as a contribution to the discussion about common European minimum standards; (b) assessing the regulative impact that the principle of efficiency could have on certain problems and trends, in particular the current situation of the Italian Supreme Court and its task of ensuring the uniform application of law. Turning to judicial independence, attention will be focused on the institutional and procedural devices designed to ensure judicial independence in the Italian legal system, with a view to assessing, in a subsequent article, relationships and tensions between judicial independence and the use of tools for improving the performance of judicial systems (e.g. performance targets). Finally, the topic of court specialization will be examined. By contrast, a detailed treatment of the achievement of these standards insofar as they obtain to Italian ADR bodies will remain for another day.

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<sup>1</sup> C. Althammer, *Mindeststandards im Zivilprozess*, ZVP 126 (2013), p. 3 ff.; M. Weller, C. Althammer (Hrsg.), *Mindeststandards im Europäischen Zivilprozessrecht*, Mohr Siebeck, 2015.

## II. ALTERNATIVE DISPUTE RESOLUTION: DEVICES FOR ENSURING QUALITY PERFORMANCE

A session of the conference has been devoted to alternative dispute resolution methods. In this framework it would have been no doubt of interest to address the standards of independence, specialisation and efficiency of Italian ADR bodies, taking into account the recent implementation in Italy of the ADR Directive(2013/11/EU).<sup>2</sup> However, it would not be feasible to adequately deal with ADR bodies in this report.

Apart from ordinary time constraints, there is another reason why it is inadvisable to examine ADR bodies. In effect, the most important indicators for assessing the quality performance of alternative dispute methods are fully external to ADR bodies and connected with the legal system taken as a whole, that is:

(a) Ensuring that dispute resolution methods are chosen by the parties in a truly free and informed way;

(b) Making sure that the judicial protection of rights is effective, in order to prevent the risk of unequal bargaining power between the parties giving rise to instances of unjust settlements, due to the lack of a viable alternative before the courts. This holds true particularly in the field of consumer protection in Europe, since a system of dispute resolution which is developing its own institutional structure independent from the court system is arising in this field.

To cut a long story short: addressing key features of a judicial system such as independence (and specialisation) of courts as well as its overall performance is an indicator for understanding the effective role played by ADR bodies in that system.<sup>3</sup>

## III. DRAFTING A PRINCIPLE OF EFFICIENCY OF CIVIL PROCEDURE

### 1. Opening Questions

When attempting to draft a principle of efficiency with regard to the performance of civil justice systems, it is prudent to consider whether:

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<sup>2</sup> Cf. Decreto legislativo 6 August 2015, no. 130, at [www.normattiva.it](http://www.normattiva.it).

<sup>3</sup> For further remarks cf. R. Caponi, "Just Settlement?" or "Just About Settlement"? Mediated Agreements: a Comparative Overview of the Basics, *Rebels Zeitschrift für ausländisches und internationales Privatrecht*, 2015, p. 117 ff.

(a) Introducing a principle of efficiency of civil procedure should be regarded as undesirable, because it could serve as a point of entry for neoliberal market ideology, particularly the “doing business” approach, into the administration of civil justice;<sup>4</sup>

(b) The reference to efficiency is really necessary, as efficiency could be seen as a facet of the wider claim to the effectiveness of judicial protection of rights;

(c) If a principle of efficiency of civil procedure ought to be introduced into the legal system, what wording is to be adopted and subject to such wording what practical consequences are to be expected?

## 2. Efficiency or Effectiveness?

The most sustained objections against incorporating a principle of efficiency of civil procedure arise from the fear that such codification could be the point of entry into the legal system for neoliberal market ideology, which aims to subordinate the judicial protection of rights to a profit maximising and cost minimising approach, with a view to optimal resource allocation. This argument usually includes a more general objection to the U.S. Law & Economics movement.

Judicial protection of rights and efficiency (for the purpose of welfare economics: wealth maximization), however, do not appear mutually incompatible. As Steven Shavell states:

“According to the framework of welfare economics, social welfare is assumed to be a function of individuals’ well being, that is, of their utilities. An individual’s utility, in turn, can depend on anything about which the individual cares: not only material wants, but also, for example, aesthetic tastes, altruistic feelings, or a desire for notions of fairness to be satisfied. Hence, social welfare can depend on any of these elements, and will depend on them to the extent that individuals’ utilities do. It is thus a mistake to believe that, under the economic view, social welfare reflects only narrowly ‘economic’ factors, namely the amount of goods and services to be produced and enjoyed”.<sup>5</sup>

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4 Cf. R. Stürner, Die Rolle des dogmatischen Denkens im Zivilprozessrecht, *Zeitschrift für Zivilprozess*, ZZP 127 (2014), p. 271 ff., p. 310 ff.; A. Bruns, Der Zivilprozess zwischen Rechtsschutzgewährleistung und Effizienz, *Zeitschrift für Zivilprozess*, ZZP 124 (2011), p. 29 ff.

5 S. Shavell, *Foundations of Economic Analysis of Law*, Harvard University Press, 2004, p. 2; G. Calabresi, *The future of*

If one maintained that judicial protection of rights and efficiency are incompatible, one would be bound to believe that individuals do not care about judicial protection of rights (except when they are party to civil proceedings).

The real problem is finding a way to determine how much individuals value judicial protection of rights in comparison with other goods and services they want to obtain and, accordingly, how many resources they wish to devote to the judicial system in comparison with other sectors of public administration.

This is for the political process to decide.

### 3. Efficiency and Procedural Economy

A further objection is that a principle of efficiency is unnecessary, since efficiency is merely a facet of the effectiveness of judicial protection of rights.<sup>6</sup> This objection seems to identify the principle of efficiency with the principle of procedural economy.

Yet, there is a difference between the efficiency and effectiveness, as the principle of efficiency is connected with the purposes and arrangements of the whole civil justice system, while the principle of procedural economy is rather linked to the purpose(s) of single proceedings, by claiming that such purposes be achieved in the most costefficient way.<sup>7</sup>

### 4. Efficiency of Civil Procedure: Draft Principle

The principle of efficiency of civil procedure should be designed as a procedural principle that can build a bridge between the regulation and management of single civil proceedings (or discrete classes thereof) and the systemic management of the mass of civil proceedings, through the organisation and direction of services connected with the administration of justice. In other words, it is advisable to develop such a principle as a guide for the legislator to perform a balancing exercise between the protection of plaintiffs' and defendants' interests in the fair regulation of the single dispute wherein they are involved and the citizens' interests in

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Law and Economics. Essays Reform and Recollection, Yale University Press, 2016.

<sup>6</sup> For a brief discussion on this point, cf. H. Schulze-Fielitz/C. Schütz, Justiz und Justizverwaltung zwischen Ökonomisierungsdruck und Unabhängigkeit, Duncker und Humblot, 2002, p. 14.

<sup>7</sup> Cf. A. Bruns, Der Zivilprozess zwischen Rechtsschutzgewährleistung und Effizienz, p. 29 ff., p. 31 f.

the efficient management of the mass of civil proceedings, i.e., the overall performance of the civil justice system, as they may well be users of that system in the future.<sup>8</sup>

By exploring avenues for drafting a principle of efficiency in this field, take as a starting point a very simple definition of efficiency, drawn from economics and also acknowledged by legal scholarship.<sup>9</sup> It concerns the ratio of the work done by a system relative to the resources supplied to it. It is a purely formal definition, lacking any substantive content. What is the point or what is the aim to be pursued by an efficient allocation of resources in the field of civil justice? I suggest that this aim be identified with the purposes of the civil justice system as such. Therefore, a principle of efficiency in civil justice could be tentatively drafted as follows:

“Access to the courts and effective protection of rights in a fair process should be provided by the law in an efficient way, allotting to each case an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases”.

It should be no secret that the second part of this formulation (“allotting...”) heavily draws upon Rule 1.1. (e) English and Welsh CPR. I had the opportunity to suggest a similar wording in the course of the preparatory work for a new code of civil procedure in Italy, drafted by Andrea Proto Pisani some years ago.<sup>10</sup> Under the heading “Efficiency of civil procedure”, the provision 0.8 of Proto Pisani’s draft reads in Italian as follows:

“È assicurato un impiego proporzionato delle risorse giudiziali rispetto allo scopo della giusta composizione della controversia entro un termine ragionevole, tenendo conto della necessità di riservare risorse agli altri processi”.

An alternative formulation (less elegant, but underlining the primacy of access to the court and effectiveness) could be:

“The pursuit of efficiency shall not be detrimental to the right of access to courts and the effective protection of rights”.

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8 For further remarks on this aspect and practical examples, s. *R. Caponi*, Il principio di proporzionalità nella giustizia civile: prime note sistematiche, *Rivista trimestrale di diritto e procedura civile*, 2010, p. 389ff.

9 *W. Hoffmann-Riem, E. Schmidt-Aßmann*, Effizienz als Herausforderung an das Verwaltungsrecht, *Nomos*, 1998, p. 246.

10 Cf. *A. Proto Pisani*, Per un nuovo codice di procedura civile, *Foro it.*, 2009, V, c. 1 ff.

## 5. Certain Practical Consequences in the Italian Experience

By examining the Italian experience one can explore the practical consequences of this approach. Currently, a principle of efficiency concerning civil procedure is not explicitly provided for in the Italian legal system. It is derived, however, by way of creative interpretation from the principle of reasonable duration of civil proceedings, which was introduced in 1999 in Art. 111, para 2 Const. to ensure Italian law complies with Art. 6 of the European Convention of Human Rights.<sup>11</sup> A law is required for this constitutional provision to be implemented.<sup>12</sup> However, some very questionable decisions by the Supreme Court (*Corte di cassazione*) in the last decade have disregarded statutory provisions of the Code of Civil Procedure that are clearly applicable in relevant cases, but allegedly at odds with the constitutional principle of reasonable duration.<sup>13</sup> A balanced constitutional provision on the efficiency of civil procedure would possibly have dissuaded the Supreme Court from issuing such counter intuitive rulings.

In an article published some years ago in an Italian law journal,<sup>14</sup> I pinpointed a number of ways the legislator could take into account the principle of efficiency of civil procedure in certain areas, ranging from ADR to partial claims, the structure of proceedings, class actions, access to the Supreme Court, *res judicata*, and so on.

## 6. Filtering the Access to the *Corte di cassazione*

Among the topics listed at the end of last paragraph, the heavy workload of the *Corte di cassazione* has been a serious problem for a number of decades. The Italian Supreme Court decides cases in civil and criminal matters, and is charged with the task of reviewing appellate judgments

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11 Cf. Constitutional Law no. 2 of 1999. For this interpretation, s. *A. Proto Pisani*, Il nuovo art. 111 Cost. e il giusto processo civile, *Foro italiano*, 2000, V, c. 241 ff.; *R. Caponi*, Il principio di proporzionalità nella giustizia civile: prime note sistematiche, p. 398.

12 Art. 111, para 2 Const.: “The law provides for the reasonable duration” of proceedings.

13 Cf., among others, Cass. 9 October 2008, no. 24883; Cass. 23 February 2010, no. 4309; Cass. 30 July 2008, no. 20604.

14 *R. Caponi*, Il principio di proporzionalità nella giustizia civile: prime note sistematiche.

on points of law<sup>15</sup> and ensuring “the exact observance and the uniform interpretation of the law”<sup>16</sup>.

The Italian Constitution provides for a right to review by the *Corte di cassazione* on grounds of violation of law.<sup>17</sup> Due to the extensive use of this guarantee, the number of appeals to the *Corte di cassazione* has increased dramatically in the last decades. Just over 3,000 appeals were submitted annually during the 1960s. In the 1980s the number had grown to more than 10,000 in civil cases only.<sup>18</sup> In 2013, there were 29,091 civil cases lodged to the Court for review. In the same year the Court disposed of 30,179 civil cases. At the end of the year there were 98,690 civil cases pending.<sup>19</sup>

One can ascertain the clearance rate concerning the Supreme Court for 2013. This performance indicator can be used to see if the courts are keeping up to date with the number of incoming cases without increasing their backlog.<sup>20</sup> The clearance rate, expressed as a percentage, is obtained when the number of resolved cases is divided by the number of incoming cases and the result is multiplied by 100. In 2013, the clearance rate amounted to 103, the *Corte di cassazione* is thus decreasing its backlog.

Apart from the clearance rate indicator – following the CEPEJ approach – the disposition time indicator can provide further insight into how the Supreme Court manages its flow of cases. This indicator, expressed as a timeframe in days, is obtained when the number of unresolved cases at the end of a period (normally a year) is divided by the number of resolved cases in the same period and the result is multiplied

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15 Cf. Art. 360 c.p.c. (Code of Civil Procedure). Cf. M. De Cristofaro, N. Troncker (eds.), *Civil Justice in Italy*, Nagoya University Comparative Study of Civil Justice, 2010, p. 24 ff.

16 Art. 65 r.d. no. 12 of 1941 (Law on judicial organisation, *ordinamento giudiziario*).

17 Cf. Art. 111, para 7 Const.

18 Cf. M. De Cristofaro, N. Troncker (eds.), *Civil Justice in Italy*, p. 26, Footnote no. 24.

19 Cf. *Ministero della giustizia*, Piano della performance 2015–2017, [www.giustizia.it](http://www.giustizia.it), p. 15.

20 Cf. CEPEJ, Report on European Judicial Systems – Edition 2014 (2012 Data): Efficiency and Quality of Justice, [www.coe.int](http://www.coe.int), p. 190: “A clearance rate close to 100 % indicates the ability of the court or of a judicial system to resolve more or less as many cases as the number of incoming cases within the given time period. A clearance rate above 100 % indicates the ability of the system to resolve more cases than received, thus reducing any potential backlog. Finally, if the number of incoming cases is higher than the number of resolved cases, the clearance rate will fall below 100 %. When a clearance rate goes below 100 %, the number of unresolved cases at the end of a reporting period (backlog) will rise”.

by 365 (days)<sup>21</sup>. According to this formula<sup>22</sup>, in 2013 the disposition time by the Supreme Courts amounted to slightly more than three years and three months (1,193 days).

These indicators (in particular the latter) are of limited value, however, as they can only give an overview of the average duration of cases; they fail to take into account the moment in which the appeal has been lodged, as well as the validity, contents, and complexity of the cases. They fail, thus, to differentiate the flow of cases into discrete classes and to determine the real duration of the cases accordingly. By way of example, consider the average duration in 2013 (1,193 days), which was about an 18% increase in comparison to 2012.<sup>23</sup> At first sight, one might think that this increase in the average duration of litigation is a sign of a worsening of the situation. Quite the opposite holds true, as the increase was a result of successful efforts to tackle the backlog of cases. In fact, the greater the number of preexisting proceedings the Court disposes of in a given time span, the more the average length of resolved cases will increase in the same period<sup>24</sup>, but of course this will be a temporary increase.

Court delays are not the only consequence of the heavy workload and the flood of applications. The large numbers of decisions requires a large number of judges: in 2013 there were 121 civil judges who decided approximately 240 cases per capita<sup>25</sup>: subtracting 30 days of holidays and 52 weekends from 365 day, each judge of the Supreme Court writes slightly

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21 Cf. *CEPEJ*, Report on European Judicial Systems, p. 190 f.: “A case turnover ratio and a disposition time indicator provide further insight into how a judicial system manages its flow of cases. Generally, a case turnover ratio and disposition time compares the number of resolved cases during the observed period and the number of unresolved cases at the end of the observed period. The ratios measure how quickly a judicial system (or a court) ‘turns over’ the cases received – that is, how long it takes for a type of case to be resolved. The relationship between the number of cases that are resolved during an observed period and the number of unresolved cases at the end of the period can be expressed in two ways. The first measures the share of resolved cases from the same category in the remaining backlog [...]. The second possibility, which relies on the first data, determines the number of days necessary for a pending case to be solved in court. This prospective indicator [...] is an indicator of timeframe, more precisely of disposition time, which is calculated by dividing 365 days in a year by the case turnover ratio [...]. It needs to be mentioned that this ratio does not provide a clear estimate of the average time needed to process each case”.

22 A slightly different formula used to calculate delay is  $(C1 + C2) : (E + U) = g$ . C1 is the number of proceedings pending at the beginning of a period (normally, a year), C2 is the number of proceedings pending at the beginning of the following period, E is the number of cases filed during the year, U is the number of cases disposed of during the year, and finally g is the average duration in years and fractions of years.

23 *Ministero della giustizia*, Piano della performance 2015–2017, p. 15.

24 Cf. *Corte suprema di cassazione*, Relazione sull’amministrazione della giustizia nell’anno 2013, [www.cortedicassazione.it](http://www.cortedicassazione.it), p. 60.

25 Cf. *Corte suprema di cassazione*, Relazione sull’amministrazione della giustizia nell’anno 2014, p. 61.



more than one text of decision per day. Thus, conflicting judgments are unavoidable and, as such, the *Corte di cassazione* has been for decades unable to guarantee the consistency and predictability of its decisions, which makes the uniform interpretation of the law a difficult task to be achieved:<sup>26</sup> “Instead, the court has become a sort of judicial supermarket, wherein lawyers can often be sure to find any precedent they need to plead the case of their client”<sup>27</sup>, which increases legal uncertainty and the litigation rate in the Italian legal system.

In the last decade some “internal” procedural devices were introduced to reduce the workload of the Court with modest results.<sup>28</sup> The best solution to tackle this problem would be to filter access to the Court in order to reduce the number of appeals only to those having a great significance, analogous to how access to the German Supreme Court is regulated. This reform proposal is strongly opposed by the bar, on the basis that the constitutional right to review by the *Corte di cassazione* implies an unrestricted access to the courts up to the Supreme Court.

A constitutional principle of efficiency of civil procedure would allow the legislator to introduce a filter to the *Corte di cassazione*, such as to balance access to the courts with the need to concentrate resources for the Corte di cassazione to better perform its task of ensuring uniform application of the law.<sup>29</sup>

## IV. JUDICIAL INDEPENDENCE: INSTITUTIONAL AND PROCEDURAL DEVICES

### 1. Introductory Remarks

Judicial independence is a major principle of civil procedure world-

<sup>26</sup> Cf. M. De Cristofaro, N. Trocker (eds.), *Civil Justice in Italy*, p. 26.

<sup>27</sup> S. Chiarloni, *Civil Justice and its Paradoxes: An Italian Perspective*, in A.A.S. Zuckerman, S. Chiarloni, P. Gottwald (eds.), *Civil Justice in Crisis. Comparative Perspectives of Civil Procedure*, Oxford University Press, 1999, p. 263 ff., p. 267.

<sup>28</sup> Cf. from the newest: reform of the Art. 360, n. 5 c.p.c. (L. no. 134 of 2012); Art. 360bis c.p.c. (L. no. 69 of 2009, also introducing the Sixth Section “Filter”); Art. 366bis c.p.c. (introducing in 2006 a new requirement of the application for review, the so called *quesito di diritto*, query on point of law, abolished in 2009); Art. 375, 380bis, 380ter c.p.c. (L. No. 89 of 2001, regulating an accelerated proceedings, *procedimento in camera di consiglio*).

<sup>29</sup> Pointing in that direction cf. the results of the General Assembly of the Supreme Court, held in June 2015, suggesting to Parliament and government to amend Art. 111 Const., limiting the admissibility of appeals to the *Corte di cassazione* in civil matters to cases in which this is needed in order to formulate “legal principles of general validity”, [www.cortedicassazione.it](http://www.cortedicassazione.it).

wide.<sup>30</sup> The Principles of Transnational Civil Procedure, as adopted by the American Law Institute and Unidroit in 2004, provide:

“The court and the judges should have judicial independence to decide the dispute according to the facts and the law, including freedom from improper internal and external influence”.<sup>31</sup>

Promoting judicial independence requires, of course, the complementarity and the interplay between different substantive elements: recruitment, tenures, salaries, discipline, immunity, physical security, administrative autonomy, training, and so on.<sup>32</sup> First of all, however, judicial independence requires that certain institutional and procedural devices are adopted; that is, bodies and proceedings in charge of ensuring its realisation and able to react against violation and interference by other (public and private) entities.

In Europe, a great divide exists between legal systems in which judicial independence is ensured through a high council of the judiciary, such as in the Italian, and those in which it is not, such as in the German legal system.<sup>33</sup> In the last decades, the trend is towards an expansion of the high council system<sup>34</sup>. The Italian High Council of the Judiciary (*Consiglio Superiore della Magistratura*, the ‘CSM’), one of the oldest councils for the judiciary in Europe (it was established by Art. 104 Const. and began functioning in 1958),<sup>35</sup> has played a leading role in this trend. It is a model for developing independent judicial councils across Europe and has taken part in “twinning projects”<sup>36</sup> that support high councils for the judiciary in

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30 Cf. e.g. *S. Shetreet, J. Deschênes* (eds.), *Judicial Independence, The Contemporary Debate*, M. Nijhoff, 1985; *S.B. Burbank, B. Friedman* (eds.), *Judicial Independence at the Crossroads, An Interdisciplinary Approach*, Sage Publications, 2002; *A. Seibert-Fohr, L.F. Müller* (eds.), *Judicial Independence in Transition*, Springer, 2012.

31 Cf. Ali/Unidroit Principle no. 1.1. Cf. also Art. 6, para 1 European Convention of Human Rights; Art. 47 Charter of Fundamental Rights of the European Union.

32 *V.C. Jackson*, *Judicial Independence: Structure, Context, Attitude*, A. Seibert Fohr, L.F. Müller (eds.), *Judicial Independence in Transition*, Springer, 2012, p. 19 ff.

33 Cf. European Network of Council for the Judiciary, ENCJ, [www.encj.eu](http://www.encj.eu).

34 Cf. *B. Hess, G. Dimitropoulos* (eds.), *Judicial Reforms in Luxembourg and Europe*, Nomos, 2014.

35 In the Italian legal system, a Superior Council of the Judiciary was first established by a law of 1907, but it was merely a consultative body to the Minister of Justice, who had the ultimate say in matters of the recruitment, assignment, transfer, promotion and disciplinary measures affecting judges and prosecutors. One year later a disciplinary court was established. Cf. *R. Caponi*, *Judicial Independence in Italy – The Role of the Consiglio Superiore della Magistratura*, B. Hess, G. Dimitropoulos (eds.), *Judicial Reforms in Luxembourg and Europe*, Nomos, 2014, p. 135ff.

36 Twinning projects are one of the tools introduced by the European Union within the European Neighbourhood Policy (ENP) to strengthen relations between the European Union and its neighbours.

eastern European countries (such as Albania and Romania). Furthermore, the *Consiglio Superiore della Magistratura* played a major role in creating the European Judicial Training Network (EJTN), which was founded in 2000. It is the main association for the exchange of knowledge and competence in the field of the judiciary in Europe,<sup>37</sup> as well as the European Network of Councils for the Judiciary (ENCJ), established in 2004 in Rome.<sup>38</sup>

## 2. Constitutional Framework of Judicial Independence

As to the Italian legal framework, key aspects concerning judicial independence of ordinary courts are found in the Italian Constitution of 1948.<sup>39</sup> The former basic law, the *Statuto Albertino* of 1948<sup>40</sup>, adopted the Napoleonic pattern, with the Judiciary placed within a structure headed by the Minister of Justice.<sup>41</sup> The Fascist regime simply reinforced the already existing structure. After World War II and the fall of the fascist regime, the Constitution assigned the courts a central role within the new democratic regime. The independence of magistrates (judges and prosecutors)<sup>42</sup> was assured by the introduction of remarkable changes in the traditional organization of the judicial function.

Fundamental provisions of the Constitution on this matter are: Justice shall be “administered in the name of the people”;<sup>43</sup> judges shall be “subject only to the law”;<sup>44</sup> the judiciary shall act as an autonomous order, independent of any other power;<sup>45</sup> magistrates shall be appointed

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37 Cf. [www.ejtn.net](http://www.ejtn.net). For further information, s. R. Caponi, Judicial Independence in Italy – The Role of the Consiglio Superiore della Magistratura, p. 135 ff.

38 Cf. [www.encj.eu](http://www.encj.eu).

39 Cf. Art. 101–110, within Part II, dealing with the organisation of the Republic. Cf. M.A. Livingston, P.G. Monateri, F. Parisi, M. Cappelletti, The Italian Legal System. An Introduction, 2<sup>nd</sup> ed., Stanford University Press, 2015, p. 72 ff.; M. De Cristofaro, N. Trocker (eds.), Civil Justice in Italy, p. 19 ff.; O.G. Chase, E. Herschkoff, L. Silberman, Y. Taniguchi, V. Varano, A. Zuckerman (eds.), Civil Litigation in Comparative Context, Thomson West, 2007, p. 82 ff., p. 122 ff.

40 The *Statuto Albertino* was the constitution that Charles Albert of Sardinia conceded to the Kingdom of Sardinia in Italy in 1848. The Statute in 1861 became the fundamental charter of the unified Kingdom of Italy and remained in force, with amendments, until 1948.

41 Art. 68 *Statuto Albertino* stated that “justice emanates from the King and is administered by the magistrates whom he appoints”.

42 In the Italian language (and legal terminology) the term “Magistrate” is used to indicate both judges and public prosecutors.

43 Art. 101, para 1 Const.

44 Art. 101, para 2 Const.

45 Art. 104, para 1 Const. In comparison with the German legal system, it is worth mentioning that the Constitutional Court (*Corte costituzionale*), vested with the authority to act as guardian of the Constitution, is not a branch of the judiciary.

by competition,<sup>46</sup> performed through written and oral examinations;<sup>47</sup> they shall be differentiated only by the diversity of their functions;<sup>48</sup> as a rule, they may not be removed from office or assigned to other courts or functions.<sup>49</sup>

### 3. High Council of the Judiciary at a Glance

The High Council of the Judiciary plays a key role in ensuring the independence of career magistrates in ordinary courts (judges and prosecutors). Apart from the power of initiating disciplinary proceedings, the Ministry of Justice has no decisional powers in governing the judiciary. Moreover, the Ministry has responsibility only for “the organisation and direction of all services connected with the administration of justice”, “except for matters within the competence of the High Council of the Judiciary”.<sup>50</sup> To put it bluntly, it is the *Consiglio Superiore della Magistratura* that is in charge of governing the judiciary and protecting judicial independence.<sup>51</sup> The system of self governance of the judiciary also includes judicial councils (*consigli giudiziari*) sitting in the courts of appeal, which perform an advisory function in all the decisions of the CSM regarding the status of judges and prosecutors working in their respective areas of territorial competence.<sup>52</sup>

### 4. Composition of the High Council

Two thirds of the CSM members are magistrates elected by their colleagues. One third of the members are drawn from among law professors and lawyers with at least 15 years of professional experience and are elected by the Parliament by a qualified majority, there by guaranteeing the

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As to the *Bundesverfassungsgericht*, the solution in the German legal system is the opposite (Art. 92 GG). The judges of the *Corte costituzionale* are chosen by Parliament (5 judges), Head of State (5), Supreme Court (3), Council of State (1), Court of Accounts (1). Cf. M. De Cristofaro, N. Tröcker (eds.), *Civil Justice in Italy*, p. 29 ff.

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46 Art. 106, para 1 Const.

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47 Law no. 48 of 2001.

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48 Art. 107, para 4 Const.

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49 Art. 107, para 1 Const.

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50 Cf. Art. 110 Const.

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51 Cf. G. Di Federico, *Judicial Independence in Italy*, A. Seibert Föhr, L.F. Müller (eds.), *Judicial Independence in Transition*, Springer, 2012, p. 357 ff., p. 397. Di Federico's paper is a major contribution on this topic.

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52 Cf. Law no. 111 of 2007.

representation of parliamentary minorities.<sup>53</sup> The CSM is presided over by the President of the Republic, who however rarely attends its meetings. The main functions of leadership, therefore, are performed by the Vice President, elected from among the members designated by the Parliament. Besides the President of the Republic, the CSM includes two other *ex officio* members: the President of the Supreme Court of Cassation and the General Prosecutor of the Supreme Court of Cassation. At present, the CSM is composed of 27 members. In addition to the three *ex officio* members, 8 members are elected by Parliament and 16 by magistrates. All 24 elected members are renewed in toto every four years and their appointment cannot be renewed in the successive four years.<sup>54</sup>

## 5. Expansion of Powers of the High Council

The purpose of ensuring judicial independence has come to shape every aspect of the governance of the judiciary in Italy and promotes an impressive expansion of the tasks of the High Council of the Judiciary, beyond the wording of Art. 105 of the Italian Constitution, which entrusts the CSM with recruitments, assignments and reassignments, promotions and disciplinary measures with regards to judges and prosecutors.<sup>55</sup>

According to *G. Di Federico*, who has extensively written on the issues of judicial independence and role of the *Consiglio Superiore della Magistratura*, there are four main areas in which the CSM's powers have expanded.<sup>56</sup>

First, the CSM issues a set of rules to be followed by the Presidents of courts when drawing up management plans that, *inter alia*, lay down criteria for the assignment of cases to individual judges.<sup>57</sup>

Secondly, the CSM's powers have expanded in relation to the professional training and education of magistrates. This field has always been considered by the CSM as a necessary tool to promote judicial independence. From the early 1990s, the CSM has progressively developed struc-

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53 Art. 104, para 4 Const.

54 Art. 104, para 7 Const.

55 For further remarks, cf. *R. Caponi*, Judicial Independence in Italy – The Role of the Consiglio Superiore della Magistratura, p. 135 ff.

56 Cf. *G. Di Federico*, Judicial Independence in Italy, p. 362.

57 Cf. *G. Di Federico*, Judicial Independence in Italy, p. 362.

tures for the planning and management of programmes of professional training and education.<sup>58</sup> In 2012 these educational activities came to an end, as a new Superior School of the Magistracy<sup>59</sup> began functioning. After an initial period of tension between the Superior School of the Magistracy and the CSM, the situation seems to be improving.

Third, the CSM may express advisory opinions to the Minister of Justice on legislative bills dealing with the administration of justice. Although the opinions are addressed to the Minister of Justice, they are in fact intended to influence parliamentarians.<sup>60</sup>

Finally, whenever the majority of the CSM deems that criticism of the magistracy as a whole or some of its members is unjustified or offensive. The CSM formally issues an official statement of reprimand as a means of protecting the independence of the judiciary and of its individual members.<sup>61</sup>

## 6. Judicial Independence v. Efficiency of Judicial System in Italy?

### a) Introductory Remarks

Turning to the relationships between efficiency and judicial independence, one immediately meets with strong views in the Italian scholarship. As G. Di Federico put it:

“The role of the [*Consiglio superiore della Magistratura*] and the developments of judicial governance in Italy seem fully to validate the worries frequently expressed in several countries with regard to the actual functioning of national judicial councils composed of a majority of magistrates, namely that the value of independence be used as a means to pursue the corporate interest of magistrates to the detriment of an effective balance between the values of independence and accountability, a balance which is necessary for the proper and efficient functioning of the judicial system”.<sup>62</sup>

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<sup>58</sup> Cf. G. Di Federico, Judicial Independence in Italy, p. 363.

<sup>59</sup> Decreto legislativo no. 26 of 2006.

<sup>60</sup> Cf. G. Di Federico, Judicial Independence in Italy, p. 364.

<sup>61</sup> Cf. G. Di Federico, Judicial Independence in Italy, p. 365.

<sup>62</sup> Cf. G. Di Federico, Judicial Independence in Italy, p. 397.

After reading Di Federico's statement, it is worth asking: (a) whether the current poor performance of the Italian civil justice is really due, in a significant way, to the lack of substantial control over the professional performance and diligence of Italian magistrates;<sup>63</sup> (b) whether the real causes of the excessive duration of civil proceedings in Italy have finally been discovered; (c) whether the strong protection of judicial independence in Italy has played a major role in causing the inefficiency of the judicial system.

## **b) Empirical Assessment: The use of Indicators**

It has become a commonplace that the Italian system of civil justice is inefficient, because of the huge backlog of cases and the delay of ordinary civil proceedings.<sup>64</sup>

To assess the current state of affairs in Italy one has to use some indicators concerning the flow of proceedings, clearance rates, disposition time, number of judges, number of lawyers, litigation rate, and so on. One should be well aware that using indicators (ingeneral and, inparticular, ina comparative perspective) is somewhat a risky business, as the researcher (especially the scholar in civil procedure working, so to speak, in a stand-alone position) has no control over its methodological premises. However, one has somehow to step in, as the use of indicators for evaluating and comparing the performance of national judicial systems in a crosscountry perspective has spread at a remarkable pace since the beginning of the XXist century and is becoming a powerful tool of global and European governance.<sup>65</sup>

## **c) The EU Justice Scoreboard**

As an example of this approach, consider the EU Justice Score-

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63 Cf. also *S. Chiarloni*, Civil Justice and its Paradoxes: An Italian Perspective, p. 277: "The fact that judges are civil servants employed by the State had given rise in the past to certain problems typical of a bureaucracy lacking a tradition of excellence and hard work".

64 For the Italian reader: "ordinary proceedings" refers to all proceedings encompassing a *cognizione piena*, a plenary assessment on the issues of fact and law of the dispute.

65 For further remarks on this point, s. R. *Caponi*, Doing business come scopo del processo civile?, *Foro Italiano*, 2015, V, c. 10 ff.; K.E. *Davis*, A. *Fisher*, B. *Kingsbury*, S.E. *Merry*, Governance by Indicators. Global Power through Quantification and Rankings, Oxford, OUP, 2012; S.E. *Merry*, The Quiet Power of Indicators. Measuring Development Corruption and the Rule of Law, Cambridge Univ. Press, 2015; R. *Rottenburg*, The World of Indicators. The Making of Governmental Knowledge through Quantification, Cambridge Univ. Press, 2015.

board, published yearly (since 2013) by the European Commission.<sup>66</sup> According to its presentation, “the EU Justice Scoreboard is an information tool aiming to assist the EU and Member States to achieve more effective justice by providing objective, reliable and comparable data on the quality, independence and efficiency of justice systems in all Member States”. As to the efficiency of the justice systems, the EU Justice Scoreboard uses a number of indicators: the length of proceedings, the clearance rate and the number of pending cases. The length of proceedings expresses the time (in days) taken by the court to reach a decision at first instance in ordinary proceedings. According to the European Commission, “the efficiency of a judicial system should already be reflected at first instance, as the first instance is an obligatory step for everyone going to court”. By saying that the EU Justice Scoreboard is not right as far as civil procedure in Italy is concerned. Ordinary proceedings are not the key instrument for ensuring judicial protection of rights in Italy any longer. In fact, over the last decades, they are becoming less and less important, even residual, to that end.

In order to take a correct view of the real state of affairs in Italy, one should take into consideration a large number of “special” proceedings (to use the Italian procedural jargon), which normally enable claimants to obtain effective and efficient judicial protection of rights in a wide range of situations. As of 2013, the number of cases brought to court by way of special proceedings (especially payment orders and provisional measures) was substantially higher than the number of ordinary proceedings.<sup>67</sup>

At the stage, it is worth taking stock of a few statistical data concerning the number of judges, the number of civil cases in the courts of first and second instance, the numbers of lawyers, and the litigation rates in Italy, expanding the data base of the EU Justice scoreboard, if necessary.

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<sup>66</sup> The Scoreboard uses different sources of information. Most of the quantitative data are currently provided by the CEPEJ, Report on European Judicial Systems, but the EU Commission draws upon additional sources of information, e.g., Eurostat, World Bank, World Economic Forum, and the European judicial networks.

<sup>67</sup> *Ministero della giustizia*, Piano della performance 2015–2017, p. 15; R. Caponi, A Masterpiece at a Glance; Piero Calamandrei, Introduzione allo Studio Sistematico dei Provvedimenti Cautelari, in L. Cadet, B. Hess, M. Requejo Isidro (eds.), *Procedural Science at the Crossroads of Different Generations*, Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, Nomos, 2015, p. 373–380.



#### d) Number of Judges

The number of career magistrates, as fixed by statute<sup>68</sup>, amounts to 10,151: 6,379 judges, 2,157 prosecutors (among them, 150 are on temporary leave of absence to perform other duties, e.g. at the Ministry of Justice, and 354 are trainees). There are about 2,765 career judges dealing at first and second instance with civil cases.<sup>69</sup>

In addition to career magistrates, there is an even higher number of honorary magistrates.<sup>70</sup> They have a legal education (mostly, they are practitioners) and are managed by the CSM, but their status and remuneration is quite different from that of career magistrates.<sup>71</sup> There are several types of honorary judges; among who are those dealing more intensively with civil cases including 1,880 justices of the peace, *giudici di pace*, (who also deal with small minor criminal offences),<sup>72</sup> 2,156 honorary judges in the courts of general jurisdiction (*tribunali*), 117 honorary judges in the courts of appeal, 1,096 honorary judges in the juvenile courts.<sup>73</sup>

#### e) Number of Proceedings (Clearance Rate, Disposition Time)

It is worth relating the number of judges dealing exclusively or mainly with civil cases (2,765 career judges, 1,880 justices of the peace, 2,156 honorary judges in the *tribunali*, and 117 honorary judges in the courts of appeal) to the number of civil cases before the courts of first and second instance. The term “civil cases” refers to all ordinary proceedings (also dealing with labour related disputes, family matters, bankruptcy and insolvency, at first and second instance), summary proceedings (mainly

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<sup>68</sup> Currently, Law no. 181 of 2008.

<sup>69</sup> This number emerges a survey conducted in 2014 by the High Council of the Judiciary, available online at [www.csm.it](http://www.csm.it). In reality, the number of career judges will be a little higher, as a few courts did not answer the questionnaire sent around by the CSM.

<sup>70</sup> Art. 106, para 2 and 116 Const.

<sup>71</sup> The trend towards the deployment of an increasing number of honorary judges is grounded in the need to reduce the costs of the administration of justice, but the differences of status and pay between honorary and career judges has caused tensions that need to be tackled by the lawgiver (s. the draft law no. 1738 of 2015, currently pending in Parliament). Historical statistics, concerning the first decades of the XXth century, show that the Italian justice system performed far better than today, when honorary judges were assigned the most of civil disputes. Cf. *A. Proto Pisani*, *Che fare della Magistratura onoraria?*, *Foro Italiano*, 2015, V, c. 364.

<sup>72</sup> For this number of currently working justices of the peace, s. *Ministero della giustizia*, *Piano della performance 2015–2017*, p. 11.

<sup>73</sup> These data are available online at [www.csm.it](http://www.csm.it).

is suing payment orders and provisional measures), and enforcement proceedings, unless otherwise indicated.<sup>74</sup>

It is illuminating to examine the statistical data from 2013, provided by the Italian Ministry of Justice.<sup>75</sup>

Concerning the justices of the peace, there were some 1,372,421 new cases, 1,415,020 resolved cases, and 1,296,075 pending cases at the end of 2013. Accordingly, the clearance rate amounted to 103, such that the backlog of cases is decreasing. The average disposition time amounted to 334 days. The justices of the peace resolved on average, circa 752 cases per capita (1,415,020 divided by 1,880), without distinguishing between ordinary proceedings and special proceedings (mainly payment orders).

In the ordinary courts of general jurisdiction (*tribunali*), there were 2,813,068 new lodgements, 2,899,247 resolved cases, and 3,265,875 pending cases at the end of 2013. Accordingly, the clearance rate amounted to 103. The average disposition time taking into account only the bulk of ordinary proceedings (ordinary proceedings, proceedings regarding labour disputes, and proceedings regarding social security benefits) amounted to 923 days (1,837,540 pending cases at the end of 2013, divided by 726,638 resolved cases, and the result multiplied by 365).<sup>76</sup>

In the courts of appeal, there were 123,241 new cases, 164,577 resolved cases, and 397,536 pending cases at the end of 2013. Accordingly, the clearance rate amounted to 133, such that the backlog of cases in the courts of appeal is substantially decreasing.<sup>77</sup> The average disposition time amounted to 881 days.

## f) Ratio Judges/Resolved Cases

Career judges as well as lay judges in the *tribunali* and in the courts

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<sup>74</sup> For detailed statistics concerning the different types of proceedings, s. *Ministero della giustizia*, Piano della performance 2015–2017, p. 15.

<sup>75</sup> Cf. *Ministero della giustizia*, Piano della performance 2015–2017, p. 15.

<sup>76</sup> For these more detailed data on ordinary proceedings, s. *Ministero della giustizia*, Piano della performance 2015–2017, p. 15.

<sup>77</sup> This clearance rate is certainly above average and may be at least partially due to the introduction in 2012 of a summary proceedings leading to the reject of appeal if there is no “reasonable prospect of success” (new Art. 348–bis c.p.c., introduced by the law no. 134 of 2012). On this aspect, s. R. *Caponi*, Italian Civil Justice System: Most Significant Innovations in the Last Years (2009–2012), in O.G. Chase, E. Hershkoff, L. Silberman, Y. Taniguchi, V. Varano, A. Zuckerman (eds.), *Civil Litigation Comparative Context*, Thomson West, Supplement 2012, [www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_074529.pdf](http://www.law.nyu.edu/sites/default/files/ECM_PRO_074529.pdf), p.136ff, p.137ff.

of appeals (2,765 career judges, 2,156 honorary judges in the *tribunali*, 117 honorary judges in the courts of appeal) disposed of an average of 176 ordinary proceedings per capita in 2013 (726,638 resolved cases in the *tribunali*, 164,577 resolved cases in the courts of appeal).<sup>78</sup> To this number one should add, as far as the *tribunali* are concerned: bankruptcy proceedings, proceedings in family matters, executory proceedings, special proceedings (mainly payment orders and provisional measures).

### g) Backlog of Cases

Finally, examining all adjudicating bodies (justices of the peace, *tribunali*, courts of appeal, *Corte di cassazione*) as well as all civil cases, there were some 4,388,591 new proceedings initiated, 4,569,332 resolved cases, and 5,155,010 pending cases at the end of 2013 (with a 4 % decrease of backlogs, compared to 2012). The number of pending cases at the end of year has been steadily decreasing in the last 4 years, with an average decrease of some 5 % per year. Of course, strictly speaking not all pending cases are delayed, because one has to subtract from the amount pending cases those whose duration is no longer than the “reasonable” length.<sup>79</sup>

### h) Interim Findings

In the light of these statistics, it is submitted that *Di Federico*’s criticism is excessive, as far as the average performance of Italian judges is concerned. This does not seem to play a key role in causing the unreasonable length of ordinary civil proceedings. This finding is confirmed by the 2015 EU Justice Scoreboard (source CEPEJ Report), where one can find that the Italian rate of resolving litigious civil and commercial cases at first instance (clearance rate) is the second best in Europe (after Luxembourg).<sup>80</sup>

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<sup>78</sup> As to the cases resolved/judges’ ratio I could not distinguish between courts in first and second instance, because I had at my disposal only the aggregate number of 2,765 career judges dealing with civil cases in the *tribunali* and *corti di appello*.

<sup>79</sup> The problem of assessing the reasonable length of plenary civil proceedings in Italy cannot be addressed here. At any rate, the level of delay has become clearly unreasonable in many cases in Italy, giving rise to many complaints to the European Court of Human Rights for violation of Art. 6, para 1 ECHR. To curb the number of complaints to the European Court, a law was passed in 2001 (law no. 89 of 2001) and amended in 2012 and 2013. It entitles those who suffered damages from the undue delay of proceedings to claim for money compensation. It should be kept in mind that the compensation may be claimed only when the duration of proceedings is over three years (in first instance).

<sup>80</sup> Cf. 2015 EU Justice Scoreboard, p. 10, figure no. 8, where one can find the clearance rates of 2010, 2012, 2013. The extraordinary good performance in 2012 can however be explained rather by a significant decrease in the number of

## i) Litigation Rate

In order to further inquire into the reasons for the unreasonable length of ordinary civil proceedings in Italy, it is worth recalling that the number of first instance incoming litigious cases per 100,000 inhabitants amounted to 2,613 in 2012.<sup>81</sup> That is a litigation rate higher than in Germany (1,961), UK (1,859) and Austria (1,235), lower than in Spain (3,828) and Greece (5,834, which is extraordinarily high compared to all others European countries), and similar to France (2,575). The Italian litigation rate, compared to that of similarly positioned European countries, is half as high.<sup>82</sup>

This finding as to Italy might be rather a consequence than a cause of the undue delay of civil proceedings, as debtors who are unwilling to fulfil their obligations can to some extent rely on the duration of proceedings and are comfortable with facing lawsuits.<sup>83</sup>

## j) Lawyers

As the litigation rate is not particularly high in Italy, one has to downgrade a little the role of the high number of lawyers as a key component in the inefficiency of civil proceedings. Of course, this is not to say that the number of lawyers is insignificant in this context. Although a selfregulated body, the legal profession has not been very successful in controlling admissions. As of 2012, Italy has the third highest number of lawyers among the countries of the Council of Europe: 226,222, that amounts to circa 379 per 100,000 inhabitants<sup>84</sup> (in Germany they are 200 per 100,000 inhabitants, in France 85, in Greece 380, in Spain 285, in

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incoming cases, particularly in the years 2010 and 2011, due both to the increase of court taxes that litigants are required to pay to initiate the proceedings, and the Italian Mediation Act 2010 (decreto legislativo no. 28 of 2010), which provides that mediation has compulsory to be sought prior to the commencement of proceedings in a significant number of disputes. For further remarks on this point, s. R. *Caponi*, Italian Civil Justice System: Most Significant Innovations in the Last Years (2009– 2012), in: O.G. Chase, E. Hershkoff, L. Silberman, Y. Taniguchi, V. Varano, A. Zuckerman (eds.), 2012, p. 137 ff.; G. *Pailli*, N. *Trocker*, Italy's New Law on Mediation in Civil and Commercial Matters, ZZPInt, 18 (2013), p. 75ff.

81 Cf. *CEPEJ*, Report on European Judicial Systems, p. 202, table 9.4.

82 For an inquiry into the causes of litigation in Italy, dating back to the 1990's but still useful, s. J. *Pellegrini*, La litigiosità in Italia, Giuffrè, 1997.

83 On this point s. D. *Marchesi*, Litiganti, avvocati e magistratura, Il Mulino, 2003, p. 71 ff.: “pathological component of civil justice demand”.

84 *CEPEJ*, Report on European Judicial Systems, p. 377, table 12.1. The highest number of lawyers is in Luxembourg; the second highest is in Greece.

Austria 93). Apart from a lucky minority of specialists in such fields as business law and administrative law, most lawyers must make what income they can out of handling large numbers of cases in low value fields, such as car accidents, credit recovery and labour cases.<sup>85</sup>

As *Trocker* put it:

“The pursuit of sources of income contributes to the judicial burden, favours futile controversies and makes lawyers turn into a stimulus to litigation instead of a restraint over it”.<sup>86</sup>

The work practices of law firms enable lawyers to handle such a large numbers of cases.

As *Chiarloni* put it:

“In such hierarchically structured firms, a chief with managerial and representative functions supervises the work of a large number of employees. The lower level employees are often beginners, employed at the level that their talents allow. Some apprentices carry out jurisprudential and doctrinal research, others carry papers to and from the court. The present slow procedures allow practitioners to manage an increasing caseload while keeping the same number of employees. Most work can be performed in the office. Thanks to postponements, work can be scheduled in order to allow the most cost effective employment of staff”.<sup>87</sup>

## **k) Structure of Proceedings**

The work practices described by Chiarloni are also adopted by medium and small sized law firms, which make up the bulk of the legal profession in Italy. The reference made to “postponements” synchronises work practices with the structure of ordinary civil proceedings.<sup>88</sup> The civil procedure of Italy, as well as those of other countries belonging to the

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85 *M. De Cristofaro, N. Trocker* (eds.), *Civil Justice in Italy*, p. 49.

86 *M. De Cristofaro, N. Trocker* (eds.), *Civil Justice in Italy*, p. 49.

87 Cf. *S. Chiarloni*, *Civil Justice and its Paradoxes: An Italian Perspective*, p. 267.

88 Cf. *R. Caponi*, *Zur Struktur des italienischen Zivilprozesses*, *Festschrift für Rolf Stürner zum 70. Geburtstag*, Mohr Siebeck, 2014, p. 1455 ff.

Romance legal family (such as France, South American countries and, until the new code of civil procedure of 2000, Spain) originates from the Italian canonical procedure. Based on this model, a procedural model with three different stages has developed: the written introductory phase (made up of the statement of claim, defendant's response, and the exchange of a number of briefs between the parties); the fact finding phase (made up of the taking of evidence by the instructing judge); and the final decision phase, where the decision on the dispute is to be issued by the instructing judge (or a judicial panel in certain cases)<sup>89</sup>, after the parties have been given the opportunity to exchange their final briefs. The fact finding phase often requires several hearings for the evidence to be compiled. This model is characterized by a sequence of hearings and not by a concentrated main hearing, such as in Germany, England and (after the new Code of Civil Procedure, enacted in 2000) in Spain.<sup>90</sup>

This structure of proceedings not only enables law firms to organise their work for a significant amount of pending cases, but also makes it possible for most judges to handle their heavy workload. In these conditions, they are more comfortable with a number of hearings (where very little advances), postponements centred on a mostly written handling of the case by the parties, and a final examination of written submissions by the judge, rather than with proceedings centred on a labour intense main hearing.

In conclusion, the current structure of ordinary proceedings coincides with the interests of law firms and the bureaucratic spirit of many judges rather than with the public interest in the timely administration of justice.

## **1) Backlog as a Leading Cause of Undue Delay**

The preceding remarks make it possible to claim that the huge workload (and backlog) of the courts plays the leading role in determining the undue delay of ordinary civil proceedings and making it difficult to implement procedural reforms aiming to change the structure of proceeding and introducing a proceeding centred on a main hearing.

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<sup>89</sup> For these cases, s. Art. 50–bis c.p.c.

<sup>90</sup> For this comparison, s. R. *Stürner*, *The Principles of Transnational Civil Procedure. An Introduction to Their Basic Conceptions*, *RabelsZ*, 69 (2005), p. 201 ff., p. 223.

Against this background one can scrutinise the two competing narratives in western countries concerning the civil justice: that there is not enough access to justice and that there is too much litigation.<sup>91</sup> However, it would not be fair to say that there is “too much” litigation in Italy (and possibly in any other jurisdiction) just as it would not be fair to say that there are too many sick people or too many people who want to make use of public transport. Rather, there are only governments which are unable to place courts, hospitals, and public transport companies in a condition to perform their duties and to cope with their caseloads, patients and passengers. To eliminate the imbalances between the supply of and demand for public services, governments can both increase supply, if there are resources to do so, and they can from a longterm perspective adopt measures in order to mitigate the human, cultural, social and economic conditions that increase litigation before the courts, illness and so on. This is for the politics to decide. Indeed:

“The inability of the politics to remedy the intolerable inefficiency of the justice system has been one of the most discouraging aspects of Italy’s recent history”.<sup>92</sup>

The huge workload of courts is primarily due to the fact that for decades the ratio of the number of judges to the number of civil cases to be decided has been unfavourable. There are too few judges in relation to the disputes to be resolved. The number of career judges per 100,000 inhabitants in Italy is lower than that of the most European countries (Italy 10.6; Germany 24; France, 10.7; Spain 11.2; Austria 18.3; Greece 23.3).<sup>93</sup> The ratio of honorary judges to 100,000 inhabitants is even more unfavourable (Italy 5.5; Germany 122.3; France 38.0; Spain, 16.7; Austria N/A, Greece N/A). Low number of judges and relative high litigation rate, half that of comparators, creates the huge workload of courts. The indifference and the inability of politicians to tackle this problem in a timely manner has contributed to the increase of the backlog of cases pending before the courts. As of 2013, the number of pending cases

<sup>91</sup> Cf. *H. Genn*, *Judging Civil Justice*, Cambridge Univ. Press, 2010, p. 78.

<sup>92</sup> Cf. *P. Ginsborg*, *L'Italia del tempo presente. Famiglia società civile stato: 1980 – 1996*, Torino, Einaudi, 1998, p. 435 ff., p. 562 f.; *S. Chiaroni*, *Civil Justice and its Paradoxes: An Italian Perspective*, p. 401 ff.

<sup>93</sup> *CEPEJ*, *Report on European Judicial Systems*, p. 155, table 7.1.

before the courts of first instance amounted to 1,296,075, before the Justice of the Peace and 3,265,875 before the tribunali.<sup>94</sup>

### **m) Heads of Court and Managerial Skills**

The managerial skills needed to lead the courts also are of concern in this context. Heads of courts are appointed by the High Council of the Judiciary often without paying enough attention to their managerial skills. This problem is linked to the composition of the *Consiglio Superiore della Magistratura*.

As to the elections of career magistrates to the CSM (who make up two thirds of the Council), a major problem is that the electoral system is not able to avoid the influence of various factions at the Magistracy who influence the list of candidates and the activities of the magistrates once elected as CSM members. As a consequence, a number of CSM decisions on the status of magistrates are challenged by magistrates before the administrative courts. The relatively high number of appeals might correspond to a widespread sense among magistrates that the decisions of the CSM are not always based on merit but may be influenced by the role played by CMS members, representing particular factions, in support of magistrates of the same faction.<sup>95</sup>

### **n) Professional Evaluations of Magistrates: Open Issues**

As to the professional evaluations and promotions of magistrates, until the mid 1960s career advancement in the judiciary was based on evaluations by senior judges, who were expected to evaluate the written judicial opinions of their younger colleagues. Following a number of statutes enacted between 1966 and 1979, this system has undergone a radical change. As a consequence, promotions have been based largely on seniority of service. Promotion to a higher position means the judge is entitled but not obliged to perform the higher level functions. Therefore, a judge may gain the status and the salary of an appellate court judge, but is permitted to continue and serve as a judge of first instance if he or she so wishes. As a consequence, a couple of thousand judges enjoy the

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<sup>94</sup> Cf. *Ministero della giustizia*, Piano della performance 2015–2017, p. 15.

<sup>95</sup> Cf. G. Di Federico, Judicial Independence in Italy, p. 361.



status and the salary of judges of *Cassazione*. These changes have certainly fostered the independence of judges. On the other hand, it has been acknowledged that the peculiar relationship which over the past 40 years or so has been created between promotion, professional evaluation and career is unsatisfactory. In fact, it is quite uncommon for a judge not to be promoted or to be dismissed from office for inability or incompetence prior to the age of mandatory retirement.

Professional evaluations and promotions are now regulated by a new law.<sup>96</sup> Magistrates are evaluated several times in the course of their career with reference to four aspects of their performance: capacity, productivity, diligence, and motivation. The new law is aimed at making the conditions of professional evaluations and promotions more stringent. An analysis of the decisions of the CSM under the new regulation shows that all the magistrates that were evaluated were regularly promoted.<sup>97</sup>

Fixing performance targets is an open issue also in Italy.<sup>98</sup>

## V. COURT SPECIALIZATION

### 1. Review of Administrative Action: A Glimpse of Legal History

The attitude of the Italian legal system to court specialization is rather complex and ambiguous. It cannot be explained without remarking on the history concerning the judicial protection of individuals against the action of the public administration, as this was the first way the question of court specialization emerged after the unification of Italy in 1861.

An attempt to concentrate the review of administrative action before ordinary courts had been enacted by law no. 2248 of 1865,<sup>99</sup> but in the subsequent decades it turned out to be incapable of ensuring judicial protection in some major situations. As a consequence, a new (fourth) section was added in 1889 to the Council of State (*Consiglio di Stato*),<sup>100</sup> with

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<sup>96</sup> Decreto legislativo no. 160/2006.

<sup>97</sup> Cf. G. Di Federico, *Judicial Independence in Italy*, p. 374.

<sup>98</sup> Cf. R. Fuzio, *La misura del lavoro del magistrato tra standard e carichi esigibili – Problema nuovo? A che punto siamo* (Nota a Consiglio sup. magistratura, 23 settembre 2015 e Consiglio sup. magistratura, 23 luglio 2014), *Foro Italiano*, 2016, III, p. 58.

<sup>99</sup> Cf. Law 20 March 1865, no. 2248, Attachment E, *Abolizione del contenzioso amministrativo*.

<sup>100</sup> Based on the French model of the Conseil d'État, the *Consiglio di Stato* is the main legal and administrative advisory body to the government administration.

the task of adjudicating on challenges of acts of the public administration filed by individuals or legal persons pleading a violation of “interests”. That move laid the foundation of a dual system of judicial review of the administrative action: ordinary civil courts had jurisdiction over violation of “subjective rights” (*diritti soggettivi*), while administrative courts had jurisdiction over violation of “legitimate interests” (*interessi legittimi*).

## 2. Ordinary Courts and “Special” Courts: Constitutional Framework

In the course of the preparatory works for the Constitution (1946–1947), the idea of establishing a single ordinary court system was taken into consideration,<sup>101</sup> by abolishing the administrative courts’ jurisdiction to adjudicate and devolving challenges to the acts of the public administration to the ordinary courts. This reform proposal was strongly supported by Piero Calamandrei, who a quarter of a century before had published “*La Cassazione civile*” (1920), where he had made a strong point about the Supreme Court as a fundamental adjudicating body committed to ensure the uniform application of law.

In the end the proposal did not gain the approval by the Constituent Assembly, but the contrasting opinions had an impact on the text of the Constitution, causing, in truth, inconsistencies in its text. The Constitution declares that (a) the judicial function must be exercised exclusively by ordinary judges appointed and governed by the rules of judicial organisation (*ordinamento giudiziario*); whereas (b) extraordinary or specialized (“special” in the Italian terminology) courts shall not be established, while the need to set up specialized adjudicating bodies shall be satisfied only by establishing specialized sections for specific subject matter within ordinary courts, wherein qualified citizen not belonging to the judiciary may participate (layjudges).<sup>102</sup>

If one read no further one could argue convincingly that the Italian constitution provides for a single ordinary court system, but the subsequent Art. 103, para no. 1 Const. belies this picture, giving the Council of State and other organs of administrative justice jurisdiction to protect legitimate interests and, in specific matters indicated by law, subjective

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<sup>101</sup> For references on this point, s. P. Comoglio, *Il giudice specializzato in materia di impresa*, Torino, Giappichelli, 2014, p. 16.

<sup>102</sup> Art. 102 Const.

rights against the public administration.<sup>103</sup> Moreover, the sixth transitional provision of the Constitution required that within five years special jurisdictional bodies still existing at the time of entering into force of the Constitution shall be reformed in accordance with the Constitution.<sup>104</sup>

### 3. The Current Situation

As a consequence of this perplexing approach, the Italian judicial system retains the distinction between ordinary and specialized courts, although specialised courts are not formally differentiated like, for example, in the German legal system (in particular, labour and social welfare disputes are brought before the ordinary courts). Currently, ordinary courts (*Giudice di pace* and *Tribunale* at first instance, *Corte di appello* at second instance; *Corte di Cassazione* as Supreme Court) administer justice in civil and criminal matters, other than those for which the Constitution<sup>105</sup> or statutory regulations<sup>106</sup> require a specialized court.

Among the specialized courts, the administrative courts are the most important.<sup>107</sup> Since 1971, they also have become more differentiated by way of the establishment of the *Tribunali amministrativi regionali*. In the last decades, the grey area linked to the distinction between rights and legitimate interests has encouraged the legislator to vest “exclusive” (i.e. irrespective of this distinction) subject matter jurisdiction in single administrative matters in the administrative courts in an increasing number of cases.<sup>108</sup> This trend is very questionable in terms of its

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103 Moreover, “judicial protection of rights and legitimate interests against acts of the public administration must always be admitted before the courts of ordinary or administrative jurisdiction. Such judicial protection cannot be abolished or limited to specified categories of acts or to particular means of challenging” (Art. 113 Const.).

104 In this way, for example, tax courts (*commissioni tributarie*) still exist today. Cf. Decreto legislativo no. 54 of 1992. Besides the tax courts, further specialized courts render justice in military matters, and other minor matters.

105 Cf. the already mentioned Art. 103 Const.

106 Cf. the already mentioned Transitional and Final Provision of the Constitution, no. V.

107 To complete the picture of special courts, the Constitution provides for the Court of Accounts (*Corte dei conti*) both as a body in charge of the preventive checking of the legality of government acts and *ex post* auditing of the management of the State budget, and, as an adjudicating body, vested with jurisdiction “over matters of public accounting and such other questions as are specified by law”. Art. 103, para 2 Const. Art. 11 of the Law no. 15 of 2009 has redesigned the government body of the Court – the so called *Consiglio di Presidenza della Corte dei Conti* – placing on an equal footing the judicial and the lay (appointed by the Parliament) components of the body. For further analysis of the role played by the *Corte dei Conti*, s. M. De Cristofaro, N. Trocker (eds.), *Civil Justice in Italy*, p. 28 f.

108 For the listing of these matters, see Art. 133 Code of Administrative Judicial Proceedings (D. Lgs. No. 104 of 2010). O.G. Chase, E. Herschkeff, L. Silberman, Y. Taniguchi, V. Varano, A. Zuckerman (eds.), *Civil Litigation in Comparative Context*, Thomson West, 2007, p. 123 f.; M. De Cristofaro, N. Trocker (eds.), *Civil Justice in Italy*, p. 27.

compliance with the Constitution,<sup>109</sup> because the above mentioned Art. 103, para no. 1 Const. states that the Council of State and other organs of administrative justice have jurisdiction to protect subjective rights against the public administration, only “in specific matters” indicated by law. Examining the matters devoted to the administrative courts’ “exclusive” subject matter jurisdiction, which are today listed in Art. 133 Code of Administrative Judicial Proceedings, they are anything but specific: disputes about agreements between citizens and public administration amending or replacing administrative measures, the right of access to administrative documents, breach of the duty of transparency, granting of the use of public goods, public services, procurement, urban planning and construction policy, challenging the rulings of independent agencies, and so on.

Moreover, this trend broadens the scope of the administrative courts’ subject matter jurisdiction, which aggravates the existing problems regarding the composition of the Council of State, as its members normally act also as consultants of the public administration and hold important positions in ministries, such as heads of legislative offices, heads of the ministerial staff, and so on. Italian narratives directed to a foreign readership<sup>110</sup> point out that in Italy “as a result of a well known historical development, administrative courts have affirmed themselves as truly independent bodies, end owed with real courts’ prestige and maintaining fundamental standards of procedural fairness”<sup>111</sup>. This may well be true, although it is somewhat a mystery how the dual role of the Council of State’s members (as both consultants of the government and judges in the disputes between citizens and public administration) is to be reconciled with the requirement of independence. We might recall that legal provisions and bodies in charge of ensuring judicial independence differ greatly in the Italian legal system between ordinary and specialized courts, as the independence of the former is ensured by the High Council of the Judiciary (*Consiglio Superiore della Magistratura*), while the independence of the latter is regulated by different statutory provisions.<sup>112</sup>

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109 Certain legal provisions belonging to this trend were indeed invalidated by the Constitutional Court no. 204 of 2004, although its overall reasoning is quite unsatisfactory.

110 Cf. M. De Cristofaro, N. Trocker (eds.), *Civil Justice in Italy*, p. 19.

111 Now codified by the Decreto legislativo, 2 July 2010, no. 104, Code of Administrative Judicial Proceedings.

112 Cf. Art. 108, para 2 Const. As to this kind of statutory provisions, consider for example Law no. 186 of 1982.

In the current scholarly discussion in Italy the proposal to establish a single ordinary courts system is once again gaining traction.<sup>113</sup>

Turning to the relationship between court specialization and efficiency, attention should be drawn to the specialized sections of ordinary courts. As the Constitution of 1948 banned the creation of new special courts, the need for a degree of expertise in certain matters ought to be satisfied by the establishment of specialized sections within the ordinary courts (e.g., specialized agricultural sections, juvenile courts).<sup>114</sup>

A new turn in the history of specialized courts is the establishment of “enterprises” courts in 2012, but an indepth analysis of this novelty should remain for another day.<sup>115</sup>

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113 Cf., among others, *A. Proto Pisani*, L'importanza dell'articolo 113, 3° comma Costituzione, per una giustizia effettiva del cittadino contro atti della Pubblica amministrazione, in *Questione giustizia*, 2015, p. 149ff.

114 *M. De Cristofaro, N. Trocker* (eds.), *Civil Justice in Italy*, p. 40.

115 Cf. Law no. 27 of 2012. Cf. *P. Comoglio*, Il giudice specializzato in materia di impresa.